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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| JUSTIN C., a Minor, etc., et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>HERBERT R. HIRSCHMANN et al.,<br><br>Defendants and Respondents. | B288791<br><br>(Los Angeles County Super. Ct. No. BC597405) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert B. Broadbelt, Judge. Affirmed.

Law Offices of John J. Jackman and John J. Jackman for Plaintiffs and Appellants.

Woodruff, Spradlin & Smart, Daniel K. Spradlin, Jeanne L. Tollison, and Roberta A. Kraus for Defendants and Respondents.

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Justin C. was struck by a car as he was crossing an intersection on his way to school. Justin and his mother, Stephanie C. (together, Plaintiffs),[1] filed a complaint against the City of Torrance (the City), alleging the collision was caused by a dangerous condition of public property. The trial court granted the City's motion for summary judgment, apparently after finding Plaintiffs failed to raise a triable issue of material fact as to whether a dangerous condition existed at the time of the incident. Plaintiffs appealed. We find the record on appeal is inadequate and affirm the judgment.

**FACTUAL AND PROCEDURAL BACKGROUND**

The morning of October 21, 2014, 76-year-old Herbert Hirschmann was driving his car south on Madison Street in a residential neighborhood near his home in Torrance. Hirschmann had a valid driver's license, despite suffering from double vision and glaucoma. Hirschmann passed Walteria Elementary School and saw kids walking to school. He continued driving for approximately 200 feet to the intersection of Madison and Newton, which was controlled by stop signs in all directions.

Traffic was heavy that morning, and there was a line of four or five cars ahead of Hirschmann waiting to enter the intersection. In addition, parents had parked or double parked on the surrounding streets in order to drop off children near the elementary school. Stephanie was one of those parents. She parked her car on the east side of Madison, a few car lengths south of the intersection with Newton. Her children, Justin and Sophia, exited the car and walked north towards the elementary school.

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[1] We refer to the plaintiffs by their first names in order to preserve Justin's anonymity. We mean no disrespect.

When they arrived at the intersection, Sophia looked both ways before she and Justin began to cross Newton by way of a marked crosswalk. Right around this time, Hirschmann reached the front of the line on Madison. He made a left turn onto Newton and struck with his car Justin and Sophia, who were in the crosswalk about halfway across the street.

Justin and Stephanie filed a complaint against Hirschmann, the City, and the Torrance Unified School District. They asserted a single "negligence" cause of action against the City, alleging that "[a]s a result of the combination of traffic, the residents trying to get to and from home, and students travelling to and from school [the Madison/Newton] intersection constituted a dangerous condition for students who were attempting to walk to school." Plaintiffs further alleged the City knew "traffic during rush hour cut through the side streets, which included Madison and Newton, in order to avoid the congestion of the major streets which surround it. [¶] [The City] knew or should of known that the amount of traffic in this area mandated the use of a crossing guard or at the very least required signage preventing through traffic from using these streets."

The City filed a motion for summary judgment, which Plaintiffs did not include in the record on appeal. Nonetheless, it is apparent from other documents in the record that the City argued, among other things, it was entitled to judgment in its favor because there was no dangerous condition of public property at the time of the incident.[2]

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[2] It appears the City also argued Plaintiffs could not recover under a general negligence theory, the City had no notice of a dangerous condition, Plaintiffs' claim is barred by design immunity (Gov. Code, § 830.6), and Stephanie's claim for

In support of its motion, the City filed a declaration from Craig Bilezerian, who is the City's Deputy Public Works Director/City Engineer. According to Bilezerian, the Madison/Newton intersection is located in a residential neighborhood with speed limits of 25 miles per hour. At the time of the incident, the intersection was controlled by stop signs, stop pavement legends, and yellow painted crosswalks in all directions. The crosswalks were repainted on an annual or bi-annual basis, typically at the beginning of the school year. Bilezerian searched City records going back 10 years and was unable to find any records of complaints or safety concerns about the intersection. Bilezerian was not aware of any prior collisions at the intersection involving an automobile and a pedestrian.

The City also submitted a declaration from Rock Miller, who is a registered civil and traffic engineer and conducted a site visit of the Madison/Newton intersection.[3] Miller explained that Walteria Elementary School is approximately 200 feet north of the intersection, and there are "slow school crossing" markings on the pavement approximately 500 feet north of the intersection. According to Miller, southbound Madison is relatively flat and straight as it approaches the intersection, and views of the crosswalks in each direction are unobstructed and visible from at least 300 feet. Miller concluded there were no "unusual conditions that might pose a hazard or difficulty for a vehicle and/or pedestrian who use the intersection when exercising

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emotional distress damages is barred as a matter of law.

[3] Plaintiffs objected to substantial portions of Miller's declaration, but the record on appeal does not reflect how the trial court ruled on those objections.

reasonable care."

Miller reviewed a 2008 traffic analysis of the area, from which he estimated that approximately 325 vehicles pass through the intersection during peak morning hours. Given this level of traffic, Miller opined the four-way stop was justified and warranted under the California Manual on Uniform Traffic Control Devices (MUTCD), which is a set of provisions that local agencies are generally required to follow for placement and use of traffic control devices. Miller also explained that, for various reasons, the MUTCD did not require a crossing guard be present at the intersection.

Miller reviewed 10 reports of prior traffic collisions that occurred at or near the Madison/Newton intersection.[4] He found none of the reports involved a pedestrian/automobile collision, and only two reports involved vehicles proceeding into the intersection. Miller also reviewed a State Wide Integrated Traffic Reporting System report, which showed no pattern of accidents or numbers of accidents that would put the City on notice of a safety or hazard concern at the intersection.

In opposition to the City's motion, Plaintiffs argued the City "knew or should have known that during the morning rush hours, traffic diverted off Pacific Coast Highway and Hawthorne Blvd. to the intersection of Madison and Newton created a dangerous condition for elementary school children by adding unnecessary vehicular congestion during the time period that elementary school students were using that intersection, which additional traffic obscured the painted markings and made students using the crosswalk difficult to see . . . ."

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[4] The 10 reports were pulled from the Torrance Police Department's database of reports dating back to 2006.

Plaintiffs submitted in support of their opposition excerpts of various depositions. They highlighted, in particular, the following testimony from Hirschmann's deposition: "I made a really sharp turn [onto Newton]. Here was some car parked directly on the corner (indicating), and here everywhere cars. I couldn't see the kids, and I told the police all that."

Plaintiffs additionally submitted a declaration from Edward Ruzak, who is an expert in traffic engineering.[5] Ruzak visited the intersection during the morning rush hour and observed a "heavily congested scene . . . as parents randomly parked and double parked their vehicles to allow elementary school children to exit their vehicles near Walteria Elementary school." According to Ruzak, the 2008 traffic analysis relied on by the City's expert was flawed in that it failed to account for vehicles that would have passed through the Madison/Newton intersection as a shortcut to avoid heavier traffic on nearby Pacific Coast Highway.

The court's order on the summary judgment motion does not appear in the record. According to the parties, the court granted the City's motion after finding, among other things, that Plaintiffs failed to raise a triable issue of fact as to whether there existed a dangerous condition of public property.[6] The court

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[5] The City objected to substantial portions of Ruzak's declaration, but the record on appeal does not include the trial court's rulings on those objections.

[6] The court also apparently found the City had no notice of a dangerous condition, Plaintiffs' claim is barred by design immunity, and Stephanie could not recover damages for emotional distress.

entered judgment in the City's favor,[7] and Plaintiffs timely appealed.

## DISCUSSION

### I. The Record on Appeal is Inadequate

When reviewing a trial court's grant of summary judgment, we begin with the principle that " '[a] judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, italics omitted; see *Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1376 [reviewing court must presume summary judgment is correct].) It is the appellant's burden on appeal to produce a record overcoming the presumption of validity of the judgment or order. (*Webman v. Little Co. of Mary Hospital* (1995) 39 Cal.App.4th 592, 595.) " 'Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant].' " (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186–188; *In re Marriage of Wilcox* (2004) 124 Cal.App.4th 492, 498.)

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[7] Plaintiffs failed to include the judgment in the initial record on appeal. On February 25, 2019, we ordered Plaintiffs to augment the record or show cause why the appeal should not be dismissed due to the absence of an appealable judgment. Plaintiffs responded that the judgment had been inadvertently omitted and moved to augment the record to include it. We grant Plaintiffs' request.

Plaintiffs elected to proceed by way of an appellant's appendix (Cal. Rules of Court, rule 8.124), yet they failed to include in the appendix the court's order granting summary judgment. After reviewing the record, we noticed that 50 pages were omitted from the version of the appendix filed with the court. Based on the index of documents, it appeared those pages included the court's order on the City's motion. On February 20, 2019, the clerk of this court informed Plaintiffs' counsel about the missing pages and urged counsel to submit a complete appendix. Plaintiffs' counsel declined to do so, responding that the pages were "omitted purposely."

On April 5, 2019, we invited the parties to submit supplemental briefs addressing whether Plaintiffs' failure to include in the record the trial court's order on the motion for summary judgment mandates affirmance of the judgment. In response, on April 11, 2019, well after briefing was complete, Plaintiffs moved to augment the record with a copy of the trial court's order. We deny the motion.

Our local rules require an appellant file a motion to augment within 40 days of the filing of the record or the appointment of counsel. Motions filed beyond that date will not be granted except upon a showing of good cause for the delay. (Ct. App., Second Dist., Local Rules of Ct., rule 2(b), Augmentation of record.) Plaintiffs did not explain why they failed to move to augment sooner, and instead claimed the omission was intentional after the clerk of the court brought the issue to their attention in February. Plaintiffs' motion to augment is entirely untimely, and they have not shown good cause for their delay.

Plaintiffs' failure to include in the record the court's order is fatal to their appeal. Although we independently review a trial court's grant of a motion for summary judgment, it is nonetheless essential that we have the court's actual order in front of us to perform an adequate review. Indeed, we cannot possibly determine whether the trial court erred without knowing precisely what actions the court took.

The absence of the trial court's order presents another, more practical problem. Our review of a summary judgment order is limited to the evidence presented in the moving and opposition papers and for which no objection was raised and sustained. (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334; *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 717.) Without the court's order—which presumably included its rulings on the parties' numerous evidentiary objections—we simply do not know the universe of evidence with which we are working.

Plaintiffs perfunctorily argue that the trial court's order is unnecessary because their appeal does not rely on evidence to which the City objected. We disagree. In their opening and reply briefs on appeal, Plaintiffs rely on portions of Ruzak's declaration to which the City objected. Moreover, contrary to Plaintiffs' claims, their arguments on appeal are not limited to whether the City met its initial burden of showing that a cause of action cannot be established or that there is a complete defense to their cause of action. Rather, Plaintiffs explicitly argue in their opening brief that they presented "ample evidence show[ing] that the condition and use of the intersection . . . were such as to constitute a dangerous condition on public property." In order to decide whether this argument has merit, we must know how the trial court ruled on the evidentiary objections. Accordingly,

Plaintiffs' failure to include in the record a copy of the court's order granting summary judgment precludes us from performing our appellate function and mandates that we affirm the judgment. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295 [resolving claim against appellants where they "should have augmented the record with a settled statement of the proceeding"]; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502 [finding a record inadequate where the appellant failed to include a copy of the challenged motion, opposition, and court order].)[8]

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[8] Even if we were to overlook the inadequate record and accept the parties' representations regarding the substance of the trial court's order, we would still affirm the judgment. The City's evidence established that, at the time of the incident, the intersection was controlled by stop signs and yellow-painted pedestrian crosswalks in all directions, which were unobstructed and plainly visible to motorists. There was an elementary school and "slow school crossing" markings just a few hundred feet to the north of the intersection, which put southbound motorists, like Hirschman, on notice that children were likely to be in the area in the morning hours. Finally, there were no records of collisions involving pedestrians at the intersection for at least seven years prior to the incident. This was sufficient to show there was no substantial risk of injury when the intersection was used with due care in a manner in which it was reasonably foreseeable that it would be used. (See *Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1070–1071.)

There is no merit to Plaintiffs' contentions that a dangerous condition existed due to the "lack of coordination and control as between pedestrians and vehicular traffic" and the "absence of some form of protection for pedestrians as a result the under-counting of vehicles" passing through the intersection. Government Code section 830.4 provides that a "condition is not a

dangerous condition . . . merely because of the failure to provide regulatory traffic control signals." (*Ibid.*; see *Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 439.) Moreover, as explained by the court in *Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, "[t]he presence or absence of crossing guards is not a physical characteristic of the intersection and thus not actionable as a dangerous condition. A lack of human supervision and protection is not a deficiency in the physical characteristics of public property." (*Id.* at pp. 1351–1352.)

There is also no merit to Plaintiffs' assertion that the intersection was dangerous because motorists' lines of sight were impaired by doubled parked cars and vehicles discharging passengers, yet there were no restrictions on left turns. Even assuming the presence of parked cars and exiting passengers could constitute a physical condition of property, Plaintiffs failed to provide any competent evidence demonstrating they created a substantial risk of injury when the intersection was used with due care.

Finally, we are not persuaded by Plaintiffs' suggestion that the four-way stop was itself a dangerous condition because pedestrians relied on it, yet it was inadequate to protect them from motorists. The undisputed evidence showed the stop signs and pedestrian crosswalks were unobstructed and plainly visible to motorists at the intersection. Under the Vehicle Code, a motorist approaching a stop sign is required to stop at the entrance to the intersection (Veh. Code, § 22450, subd. (a)), and "yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection . . . ," (Veh. Code, § 21950, subd. (a)). As a result, a motorist exercising due care would have stopped at the Madison/Newton intersection and yielded to crossing pedestrians before making a turn. Plaintiffs fail to identify any feature of the intersection that would have made it unsafe for pedestrians to cross the street under such circumstances. (See *Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1196 ["A four-

## DISPOSITION

The judgment is affirmed. The City is awarded its costs on appeal.

BIGELOW, P.J.

We concur:

GRIMES, J.

STRATTON, J.

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way stop is not an inherently dangerous condition when used with due care by the general public."].)